EXPERT EVIDENCE.

BY HON. JOHN WOODWARD, JUSTICE OF THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK.

GRAVE criticism of expert evidence in courts of law has not sprung from recently celebrated criminal cases. It is almost as old as the use of this species of evidence. Experts in language were called before Brian, C. J., in 1493, to advise the court what the Latin was for "fine," the obligation in issue requiring payment *auri puri;* but they could not tell. Experts in mercantile usage advised Holt, C. J., in the Court of King's Bench, in 1703, in Buller *vs.* Crips, that a note was to be treated in a suit by the indorsee as an inland bill of exchange. But though the Court has spoken with "two of the most famous merchants in the City of London," their views did not seem conclusive; for "the Court at last took the vacation to consider of it." A policy broker testified as an insurance expert before Lord Mansfield in 1760, in the case of Carter *vs.* Boehm, on a motion for a new trial, the plaintiff, Roger Carter, Governor of Fort Marlborough, in Sumatra, having recovered on a policy insuring the fort against capture. Count D' Estaing effected the capture of it, and "a verdict was found for the plaintiff by a special jury of merchants." Cawthorne, the broker, swore that in his opinion certain letters written by Governor Carter should have been shown to the defendant, "and, if they had, the policy would not have been underwritten." Lord Mansfield's decision may be quoted for its general applicability:

"Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness. There ought not to be a new trial."

Medical experts were called in court earlier than any others, however, of whom we have record. In 1353, the "*Liber Assisarum, anno vicesimo octavo,*" records how the advice was invoked of "*medicos chirurgicos de melioribus Londini ad informandum Dominum Regem et curiam de his quae eis ex parte Domini Regis injungerent.*" The best surgeons in London were charged to inform the court whether certain wounds constituted mayhem, the prisoner at the bar being subject to attainder if found guilty of that offence. It was not for the complainant's benefit, or for the prisoner's defence, but to inform the King—the State—that the experts were called.

Of an expert who testified before him in the Tracy Peerage case, Lord Campbell said:

"Hardly any weight is to be given to the evidence of what are called scientific witnesses: they come with a bias on their minds to support the cause in which they are embarked."

Experts in handwriting have given rise latterly to the abuses most often complained of. As I had occasion to observe from the bench, in the matter of the Estate of R. E. Hopkins, "so notorious is it (the abuse of expert evidence) becoming that, if it is not checked, it seems to me a reaction must inevitably come that will abolish such testimony altogether."

Specialization is the order of the day, and the expert is a professed specialist. In a criminal case, pending for eight years past, the identity of a famous violin was in issue, and expert violin-makers were called to bear witness to it. Experts in electricity, in chemistry, and in any one of the arts or sciences may figure in the legal proceedings of to-day. An examination of the law and the precedents relating to medical and handwriting experts, whose evidence so often concerns the wealth, the sanity and the very life itself of women and men, may help us to arrive at some practical remedy for the abuses which are usually believed to have their origin in these two kinds of testimony, but which probably inhere in the very nature of expert testimony in general.

What is an expert? Stephen thus defines his functions:

"When there is a question as to any point of science or art, the opinions upon that point of persons especially skilled in any such matter, are deemed to be relevant facts. The word science or art includes all subjects on which a special study or experience is necessary to the formation of an opinion."

St. Clair McKelway, in an admirable paper on this subject, has given this definition:

"An expert must be regarded as any specialist giving evidence in the form of opinion, no matter what his real or reputed standing in his specialty or in the community."

While this is an excellent working definition, framed so as to invite discussion of the abuses incident to the system, I would substitute the following instead: An expert is a specialist, the value of whose evidence, given in the form of opinion, is proportioned to his character, to his reputation for honesty in the community, and to his standing in his specialty or profession. It is not sufficient that he be thought wise, he must also be accounted honest.

Jones, in one of the best recent text books,[1] says:

"If the non-professional witness must, on grounds of necessity, be sometimes allowed to state the inferences which irresistibly rise in his mind from those minute facts which he cannot detail, there are still stronger reasons for receiving, under proper limitations, the opinions of those skilled in matters of trade and science."

We have seen that expert evidence is as old almost as Anglo-Saxon, or rather Anglo-Norman, jurisprudence. Its disrepute has not grown less with years. Presiding Justice Goodrich of Brooklyn spoke not long since of "paid experts . . swearing for or against the sanity of a prisoner, according to the amount of their fee and the person who calls them." Justice Rumsey of the Appellate Division said of an expert, "the sole difference between him and an advocate being that he makes his argument under oath, and that he endeavors to add the weight of the oath to the opinion of the advocate." "Expert witnesses," said Justice Adams of Canandaigua, "are far more anxious to destroy each other . . than to elucidate the particular question in issue." Let the courts continue their denunciations, said he, until "experts mend their ways." Professor R. A. Witthaus, who has testified as a chemist in several capital cases, in commenting on "the just disrepute of expert testimony," has declared one of the causes to be "the employment of blatant, ignorant persons, or even of persons who do not hesitate at plain perjury." Jones declares that expert evidence is admitted when the subject matter of in-

[1] "The Law of Evidence in Civil Cases," by Burr W. Jones.

quiry "so far partakes of the nature of a science as to require a course of previous habit or study in order to attain a knowledge of it." But, says he, "it is not desirable in any case where the jury can get along without it," it "is of the very lowest order and the most unsatisfactory character," it is "justly exposed to a reasonable degree of suspicion" and "should be received with great caution by the jury."

In Ferguson *vs.* Hubbell, in the New York Court of Appeals, Judge Earl said: "It is generally safer to take the judgments of unskilled jurors than the opinions of hired experts." W. A. Purrington, Esq., a well known member of the New York Bar, declares[1] that "an expert is as honest as any other witness," but he admits that "perjury is too frequent with all classes" and that an expert witness is not punishable for perjury, "even in cases of wilful falsehood."

"If the testimony of the expert," said the Court in United States *vs.* McGhee, "is opposed to the jury's convictions of truth, it is their duty to disregard it."

It may not be possible for the jurors to free their minds from the tendency suggested by the testimony of experts, even should they conclude to disregard it. This, and the impossibility of securing at present the conviction of an expert for perjury, are two of the salient phases of the question. Says Jones:

> "The notorious fact that experts of equal credibility and skill are found, in almost every important cause, testifying to directly opposite conclusions, illustrates both the fallibility of such testimony and the fact that a conviction for perjury based upon such evidence would be very difficult. It is a matter of common observation in the courts that witnesses of the highest character and of undoubted veracity may be easily led, as experts, to espouse and defend a theory with all the zeal of the advocate."

In addition to his immunity from the penalties of perjury, the expert witness is immune also from the requirements of an exact standard of fitness. His fees need regulation, and the nature of the questions which may be put to him needs clearer limitation. He "may give an opinion in court on facts to which other witnesses have testified," yet he "should not be allowed to draw conclusions of fact from the testimony of other witnesses in the

[1] The Nature of Expert Testimony and some Defects in the Methods by which it is adduced in evidence.

case." He is a *judex facti*—though not a judge of the law, like the Court, nor of the facts like the jury.

The medical expert and the handwriting expert are subject to the same rules of law as other expert witnesses. But they may seem in the public mind to stand each in a class of his own. Specific comments upon the famous murder trials in New York City in which these two classes of experts have figured conspicuously in recent years, would be out of place in this paper. We all know medical experts who have given contradictory opinions under different circumstances in regard to the same fact. A medical man of the highest rank, an author and professor, who had in twenty years' practice seen three cases of opium and one of morphine poisoning, swore in the Buchanan case that "opium or morphine poisoning could not be diagnosed from symptoms alone." Opposing medical experts, who swore that they had seen seventy such cases in that time, were just as positive that such poisoning could be diagnosed from symptoms alone. Nobody thought then or since that the distinguished professor and author was anything less than a man of honor and intelligence; but some physicians have since expressed the opinion that Dr. Buchanan was not legally convicted of the crime for which he paid the penalty at Sing Sing.

In the case of Alsop *vs.* Bowtrell in ejectment heard in the King's Bench in 1619, at the Michaelmas term, the Court instructed the jury, on the strength of the expert evidence of "two doctors of physic, Sir Wm. Baddy and Dr. Mundford," that "the said Elizabeth (Andrews), who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund."

The opinion of these doctors seemed conclusive to the Court. Doubtless, justice was done. But there was probably a different result in the trial of Rose Cullender and Amy Duny, two poor widows, before Sir Matthew Hale, Lord Chief Baron of His Majesty's Court of Exchequer, in 1665, for witchcraft. The author of "Religio Medici," Sir Thomas Browne, one of the most eminent men of the times, testified as a medical expert:

"There was also Dr. Brown of Norwich, a person of great knowledge; who, after this evidence given, and upon view of the three persons in court, was desired to give his opinion, what he did conceive of them; and he was clearly of opinion that the persons were bewitched; and said

that in Denmark there had been lately a great discovery of witches who used the very same way of afflicting persons, by conveying pins into them. And his opinion was that the Devil in such cases did work upon the bodies of men and women.

"The judge and all the court were fully satisfied with the verdict and thereupon gave judgment against the witches that they should be hanged. . . . And they were executed on Monday the 17th of March following, but they confessed nothing."

Conviction also followed the medical testimony at the trial of the Earl of Pembroke for murder, in 1678, in which Mr. Raven was examined as an expert for the defence and said (not under oath):

"I viewed the body, my lord, before and when it was opened . . and could find no blackness or blueness . . . .; upon which the body was opened and there issued thence clotted blood; then I looked upon the caul which was withered and consumed, and the heart was as loose as a rag, and his lungs stuck to each side of his ribs; and as to the matter of the blood, that was not an extraordinary thing, for it is known to physicians that in all natural deaths there must be extravasated blood in the lower belly."

In 1679, at the trial of Green, Berry and Hill at the King's Bench, for the murder of Sir E. Godfrey, "the chirurgeons that viewed and opened the body, Mr. "Skillard and Mr. Cambridge" were called for the prosecution and Skillard testified: "All strangled people never swell, because there is a sudden deprivation of all the Spirits and a hindering of the circulation of the blood." The prisoner Berry declared himself "as innocent as is the child that is new born," and hoped that his death "might be the last innocent blood that might be shed in the land." "And when the cart was drawing from under him, he lifted up his hands towards heaven and said, 'As I am innocent, so receive my soul, O Lord Jesus.'"

The medical expert of to-day would laugh at the opinion of the medical expert of 1678 and 1679. But men were executed then, as some are now, on the strength of such testimony. A hundred years from now, medical men will no doubt laugh at the medical opinion of 1902.

All the ambiguities, however, are not necessarily medical. Here is a form of hypothetical question framed by a prominent Western prosecuting officer, who introduced it by the statement that some questions do confuse even expert witnesses:

"Assuming the testimony of the previous witnesses tending to show the circumstances, if any, leading up to the act, and tending to show the acts of defendant, if any, in relation to the homicide, to be true, and tending to show that the conduct of defendant, if in immediate connection with the act, was that or was not that, of a sane man, as the case may have been,—state whether in your opinion, at the time he committed the act, defendant was sane or insane?"

Laymen object to the methods which employ circumlocutions like this. In describing a capital case the same legal authority said:

"The theory of the defence was self-defence, and that the defendant did not do the cutting, and that he used no knife against deceased; that he was attacked by deceased with a chisel, and it was insisted upon by him that the wounds were inflicted during the affray by it—in the scuffle."

The shrewdest bandit of modern times, Musolino, was recently condemned to penal servitude for life in Calabria. The London *Lancet* observes of "the hideous welter of expert evidence":

"That with such a career he should have been defended, by criminologists of the Lombroso school, as little better than an anthropoid ape or pithecoid man is barely credible, but such is the fact."

A distinguished surgeon of Northern New York, testifying in a criminal case as an expert a few weeks ago, was asked on cross-examination by the counsel for the prisoner:

"Isn't it fair to assume, if I had money to pay the physicians for their time, that I could step out here in the city and secure half a dozen competent physicians, who, in answer to the hypothetical question put by the District Attorney, would give me exactly the opposite answer?"

The distinguished surgeon's very candid reply was: "I think it is."

A physician called upon to give an opinion for the plaintiff, in a case of insanity where a large fortune was involved, several times privately expressed the opinion that the subject was "mad as a hare." On the witness stand, he swore positively that he had not seen any evidence of mental unsoundness, though he thought the defendant "somewhat erratic and melancholy." The defendant won his case, and a few weeks later the physician presented at the bank a check for five thousand dollars signed by the defendant. I have personal knowledge of these facts.

Is not the remedy for these flagrant, but, after all, infrequent, instances of professional dishonor in the hands of the medical profession itself?

Handwriting experts occupy a different position. "The courts," says Jones,[1] "have often spoken of evidence derived from the comparison of handwriting as weak and unsatisfactory." Professor James Bradley Thayer, Weld Professor of Law in Harvard University, in his "Preliminary Treatise on Evidence at the Common Law," one of the most recent of the books, says: "there are other questions not requiring skill or training, but only special opportunities of observation, like handwriting and the value of property," on which opinion-evidence may be received. But it is now notorious that professional handwriting experts do offer themselves to the world as trained and skilful, and are habitually called to give opinion-evidence, by whoever chooses to retain them. "Knowledge of Handwriting," says Lawson,[2] acquired for the purpose of testifying, will qualify only where it is clear that there was no motive either in the writer or the witness to manufacture testimony."

In 1898, the United States Attorney for the Northern District of New York, was asked to prosecute a woman of social standing in one of the large cities of that district, for circulating scandalous and defamatory postal cards through the United States mails. Over 2,000 postal cards had been received by patients of a leading physician of that city scandalizing the doctor. All were apparently in the same handwriting. The accused woman was indicted by the federal grand jury and the case prepared for trial. Few specimens of her handwriting were obtainable. These specimens, together with a number of the postal cards, were submitted to one of the leading experts in handwriting in the United States. After weeks of investigation, study and research, he pronounced it as his opinion that the specimens and the postal cards were written by one and the same person. In the subsequent preparation of the case for trial, specimens of handwriting of another person, supposed to have had no connection with the controversy, but bearing some similitude to the handwriting on the postal cards, came into the possession of the United States Attorney. To test the value of the opinion so forcibly expressed by the expert, that

[1] "The Law of Evidence in Civil Cases," p. 570.

[2] "Expert Evidence," Rule 54, affirmed in many decisions.

none but the accused could have written the postal cards, these new specimens, known to have been written by another person entirely and at the dictation of the United States Commissioner, in his presence, were submitted to the same expert, together with a dozen of the postal cards, with the statement that additional specimens of handwriting in the case had been obtained, and that his opinion was desired as to whether the new specimens and the postal cards were written by the same person. The United States Attorney was in due course furnished with minute details of the examination of the additional specimens and postal cards, upon which the expert built an argument that irresistibly led to the conclusion that there could be no possible doubt that the new specimens were also written by the same person who wrote the postal cards.

If this distinguished expert was correct in his first opinion, the accused was guilty; if he was correct in his second opinion, the wrong person had been indicted. As the prosecution depended solely upon expert testimony, and had received these irreconcilable opinions from the same expert, whose standing was unimpeachable, the government concluded it to be unfair and unwise to press a trial, and the indictment was dismissed. The expert in question has since appeared as an important witness in a celebrated murder case.

I am well acquainted with the prosecuting attorney who furnishes me these facts. I know him to be a man of ability and integrity. I cordially approve of his disposition of the case. His manliness is commended to the consideration of those overzealous prosecutors whose ambition for a great record number of convictions seems to stifle that high sense of justice and responsibility without which the administration of the criminal law is worse than a mockery. It is moral crime.

Remedies for the evils of expertism have occupied many thoughtful minds of late years. Legislation has been drafted, but not enacted, in New York, Pennsylvania and Illinois. Judge Werner of the Supreme Court of New York has expressed the opinion that "the good name of the medical profession requires some reform;" Judge McAdam, that the disagreement of experts often results in "miscarriage of justice." Judge Robert C. Titus of Buffalo has said that the present system is absolutely immoral in its tendency. Judge Wm. N. Cohen of New York has stated

that as a rule "such testimony is quite valueless." These jurists had medical witnesses especially in mind. The need of reform is quite as strenuous among professional handwriting experts. Yet most of the remedies so far suggested have been applicable to medical witnesses especially.

Of the various remedies for the faults in the system of expert testimony, I cannot believe that any is attainable by legislation. Indeed, I do not believe that the fault is in the system, so much as in that relaxation of the professional and public conscience which has permitted abuses to continue uncorrected. Much is to be said in favor of the selection by an examining board or commission, composed of the acknowledged leaders of each scientific guild or profession, of those members of that guild or profession who may be properly called as experts. The selection then from these lists furnished to the court would be comparatively easy, and it should follow that only able and honest specialists would be called to the witness stand. The naming and summoning of these expert witnesses, each already designated for the honor by the highest opinion of his own profession, might appropriately be delegated to the Appellate Division of the Supreme Court, which is a co-ordinate branch of the government, independent of all considerations except those of justice, and removed even from the bias of the executive or the power of the legislative branches.

The standing of experts in the public eye would at once be improved when it became known that only the best could be chosen, and that, of these, few would be likely to decline to serve save for the best of reasons and at the discretion of the court.

If, in addition, it became evident that there was little possibility of gain to the expert witness in the event of the case being decided in favor of the side upon which he was called to testify, another and very important step would be achieved. For, after all, the question of the compensation of such experts is of great importance. It seems to me that, except where a professional expert is employed at a salary by a corporation, the rate of compensation for expert witnesses should be a stated sum *per diem* fixed by the Appellate Division, or, if preferred, in some equally dignified method, after consultation with the original boards of selection in each profession or guild. Much temptation would be taken away, and the dignity of the expert himself would be elevated not a little by such an arrangement. With the jury his

opinion would be enhanced in value by the fact that he could in no way profit by his testimony. While it might be true that a great authority, whose ordinary charges would be as much higher than those of the average practitioner as his reputation was greater, might not be satisfied with the amount of compensation thus fixed as an absolute expert fee, and might therefore decline to serve at the summons of the court, public opinion would clearly condemn him in any such course. Indeed, the subpœna of the court should compel instant compliance. For ages, the law has used its best talents for the defence and maintenance of the rights of the poor; it is quite time that the able and talented members of other professions should, it seems to me, display something of the same chivalry, knowing that they would in this way be making a substantial contribution at least to the honor of their own profession. If any such expert thought his services were too frequently demanded, he could readily appeal to the Appellate Division for relief.

It is indeed time that the law should determine that no fee be dependent upon an opinion, and that no man or corporation have power to tempt others to false swearing by the use of money. The suborner should meet with the same condemnation as the perjurer, and the legal penalty for his offence should be greater. After all, a "persuader" is simply a bribe by another name.

The legal, absolute and fair standard of compensation for experts having thus been established, I believe it would be in the interests of justice that the State should, in criminal cases, pay the experts called on both sides.

The suggestion has been made that State medical experts, for the judicial districts, might be appointed by the judge or by the Governor. To me such a plan seems fraught with danger. The scramble for such an office would not be more dignified than that for any other. The peril of political favoritism would be always present. With a medical expert in every district, drawing a salary from the State, it would not be long before there would come a demand for a chemical expert, and so on through the various specialties of art and science. Nor do I agree with those who maintain that the question at issue should be submitted in writing to experts, whose opinions, given in secret session, should be returned to the court in writing. Such procedure might lead to great abuse. All written opinions have an equal significance.

How can the jury judge of the credibility of a witness without seeing him? His voice, his attitude, his appearance, his manner, all aid in the final determination of the value of his opinion; and these are not apparent unless he is examined and cross-examined in open court, like any other witness. Nor can the judge himself ever be made the final authority on the value of expert testimony. The expert, as a rule, is as ignorant of other specialties than his own as the average layman is. Nor would the judge ordinarily know more of the particular specialty under consideration than would any member of the jury. To make the judge, therefore, the arbiter on opinions which have all the weight of a fact, would be to establish a precedent whose logical outcome would overthrow our system of jurisprudence.

When, however, the honest opinion of one expert is met by the unbiased counter-statement of another expert, it is then that the judge may appropriately act. He should invoke a third authority, and this specialist's testimony might bring about such a re-discussion of the subject as to elicit the truth or a fair compromise. To the judge, also, any expert witness should unhesitatingly appeal when the witness feels that counsel has prepared an exaggerated affidavit, or put a different construction upon his testimony than the expert intended.

It has been suggested that the judge, who is himself a sworn expert in the law, might limit the length of the examination and cross-examination of an expert witness. It has also been suggested that the judge should instruct the jury as to the value of the expert witness's testimony. It seems to me that this tends to threaten the autonomy of our jurisprudence and would violate a time-honored maxim of the law. In all cases where trial by jury is had, the judge should not pass on questions of fact; the jury alone can decide as to the credibility of a witness. Even when he is an expert witness, the opinion of the twelve jurors as to the value of his testimony may not be subordinated to the judgment of any other person.

It is the retained expert of a corporation, and the chronic experts of the plaintiff in negligence cases, who have excited the greatest hostility and merited the severest condemnation. Nevertheless, the employment of a retained expert by a corporation is perfectly proper. A railroad company, for example, that may have a thousand accident suits brought against it in a year, cannot

be expected to hire a different expert to examine into the merits of each case. There should, however, be a special obligation that the retained expert should be above the suspicion of bias. If chosen for the company by the court from a number of candidates in each profession—in whose selection the corporation itself might have a voice—there could be no objection to him. Should such an expert show obvious partiality, he could be expelled from his own profession, a punishment which, after all, it seems to me is the one which ought to have the greatest terrors for any expert witness. If any officer of such corporation should attempt to influence the finding of any such expert by promise, bribe or threat, the offender should be dealt with rigorously.

The president of the New York County Medical Society recommended some years ago that the Leeds practice, which has been found successful in England in a community where there are many accident cases, might properly be introduced in our practice. That would involve, in all equity cases or suits tried before the Court without a jury, the appearance of experts on the bench to advise the judge, just as the Admiralty judges in England had retired naval officers to counsel with them. In jury trials, according to the Leeds practice, a conference would be called of medical experts, who would go into such a conference with an understanding that they would agree upon the facts. The conferring physicians could then differ only in the conclusions which they would draw from those facts, and it was suggested that it would be feasible to compute an average opinion from the medical books, for example. This method of reforming the abuses of expert testimony does not appeal to me.

The quickened conscience of the people should refuse to recognize as respectable members of society those persons who, having special knowledge in an art, science or profession, sell their opinions, or what they are pleased to term their opinions, to the highest bidder, vainly attempting to bind the bargain by the sanctity of an oath. Where a doctor commits perjury, his fellow doctors are apt to know it. Prompt expulsion from his Medical Society would tend decidedly to discourage the imitation of his example. It has been my experience that enlightened public opinion is the greatest destroyer of frauds; and the greater publicity that can be given to an obvious evil, the sooner will its remedy be discovered.

Opinion-evidence has a high and important position in enlightened jurisprudence. In questions of testamentary capacity, and in cases that turn upon the sanity of an individual, the expert is an absolute necessity. Millions of dollars may be dependent upon his testimony, the weight of which is, of course, increased in proportion to his impartiality and professional standing. If his compensation be limited by law to an absolute fee, he can have no incentive to be otherwise than rigidly honest. If he knows that the eyes of his professional fellowmen are upon him, he will have every incentive to testify to his own credit as well as theirs. Thus the sensational expert, seeing no longer in the witness stand an opportunity for the exploitation of his pocket or his reputation, will seek a more congenial employment.

JOHN WOODWARD.